



The Comptroller General
of the United States

Washington, D.C. 20548

Van Schick

Decision

Matter of: Mine Safety Appliances Company

File: B-233052

Date: February 8, 1989

DIGEST

Sole-source award is unobjectionable where the agency complied with statutory requirements for written justification and publication of notice in the Commerce Business Daily (CBD) and agency reasonably determined that only one source could supply the desired item. Protester, who submitted response to CBD notice and solicitation failed to supplement its submission with technical data showing how it would meet detailed requirements of the solicitation even though it was specifically requested to do so.

DECISION

Mine Safety Appliances Company (MSA) protests the Navy's award of a contract to the Foxboro Company under request for proposals (RFP) No. N00140-88-R-3497, for 321 halocarbon/gas alarm monitors.^{1/} MSA contends that the contracting agency improperly determined that Foxboro was the only responsible source capable of meeting the agency's needs. We deny the protest.

On June 8, 1988, the Navy published in the Commerce Business Daily (CBD) a notice of its intention to procure 341 halocarbon monitors, Foxboro part number 984/101, from that firm through the use of other than full and open competitive procedures under Federal Acquisition Regulation (FAR) § 6.302-1. The synopsis stated that the units are to be self-contained and hard mounted with both audible and visible alarms to indicate out of tolerance conditions. In addition, the synopsis stated that Foxboro was to be the sole-source for the acquisition since it is the only company

^{1/} The monitors are to be used on Navy surface ships to detect and warn of fluorinated hydrocarbon leaks.

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that manufactures a halocarbon detector with the following capabilities:

1. Unit is self-contained.
2. Operates continually and unattended.
3. Indicates within $\pm 10\%$ the halocarbon concentration.
4. Maintains calibration within ± 5 percent.
5. Has three colored operating indicators.
6. Has dual alarm setting high and low and a manual reset.
7. Has remote audible alarm of 85 DB decibels at 10 feet with 50 percent total signal in 10 seconds and 90 percent signal within 30 seconds.
8. Operates on 115 VAC, 60HZ power.
9. Back-up power system that can operate for 4 hours.
10. Key locks to prevent tampering.
11. Shock and vibration protection.
12. Bulkhead and deck mounting capability.

The CBD notice also referenced note 22 which indicated that the agency anticipated negotiating a contract with only the known source and stated that expressions of interest in the requirement or proposals received within 45 days of the publication of the synopsis would be considered.

MSA requested a copy of the solicitation and one was sent to it on the June 24 date it was issued. The solicitation included specifications similar to but more detailed than those listed in the CBD notice. Among other requirements, in addition to those in the CBD notice, the RFP specifications called for monitors which detect five different gases and which indicate the total halocarbon concentration within ± 20 percent of the actual level when subject to combinations of various halocarbons. The RFP included a closing date of July 25, which was later extended to July 27.

On July 11, the Navy finalized the written justification for use of other than competitive procedures, as required by the

Competition in Contracting Act of 1984 (CICA), 10 U.S.C. § 2304(f) (Supp. IV 1986). The justification concluded that a sole-source award to Foxboro was justified under 10 U.S.C. § 2304(c)(1), which authorizes use of other than competitive procedures when the items needed are available from only one responsible source or a limited number of such sources and no other type of product will satisfy the agency's needs. According to the justification, Foxboro was the only company that manufactures an off-the-shelf halocarbon monitor that meets the 12 listed capabilities, which were essentially the same as those listed in the CBD notice. The justification also stated that other companies may be capable of supplying a unit meeting the listed requirements but they would require 18 to 24 months to develop and manufacture such a unit.

Further, according to the justification, the Naval Research Laboratory independently tested monitors manufactured by three firms, including the solicited Foxboro monitor, and only the Foxboro unit met the agency's requirements. Finally, the justification also stated that this was an interim procurement to insure the safety of those aboard ship and that the agency is planning a future competitive procurement of halocarbon monitors using a performance specification with design latitude to meet its long-term needs.

MSA submitted a proposal in response to the RFP. That proposal consisted of a signed copy of the RFP and two amendments. On the RFP cover sheet, MSA inserted a quantity of 341 "Halocarbon Gas Alarm Monitor MSA Lira Infra Red Analyzer" at a cost of \$4,599 each for a total of \$1,568,259. The proposal also included a copy of section C "Description/Specifications" from the RFP.

According to the Navy, an agency contract negotiator contacted MSA on July 28 and asked the firm to provide technical data so the Navy could determine whether the monitors offered by MSA met the requirements of the solicitation. In response, MSA submitted an August 3 letter which explained that MSA's practice, and the practice of most firms in the industry, is to manufacture different monitor designs using a generic "base" model. According to the letter, MSA uses three base model monitors, the Lira 202, 3000 and 3200, which the firm modifies and repackages with different optics, enclosures and features as required. The letter explained that the firm's response to the RFP was for a Lira 3200 model packaged in a Nema 4X enclosure with battery back-up. Also, according to the August 3 letter, the offered components were "off-the-shelf" and no development was proposed or required. The letter also

referenced an enclosed bulletin for the Lira 3200 which described typical specifications for optics and electronics. Finally, after announcing that the response "is based on meeting the performance specifications in the RFP," the August 3 letter stated that a similar Model 3200 has been evaluated and is being used at the Norfolk Naval Shipyard and that MSA is "the single qualified manufacturer of Gas Monitors that has been approved by the Navy per MIL 901 C Shock and MIL 167-1 Vibration requirements for gas analysis on board the Navy LHD Series of Combatant Vessels."

Along with information submitted by three other firms, MSA's proposal was evaluated by the cognizant technical activity. That activity concluded that none of the responses met the agency's technical requirements.

Based on informal advice that a sole-source award was about to be made, on September 2 MSA protested any such award to the Navy. The Navy did not directly respond to that protest but, by letter dated September 16, it informed MSA that award had been made to Foxboro for 321 monitors at a price of \$7,505 each, for a total of \$2,409,105.2/. The letter also indicated that MSA's proposal of a Lira Model 3200 did not meet four solicitation requirements:

- (1) The MSA unit will not meet the accuracy requirement of ± 20 percent of the actual level for concentrations between 100 parts per million (ppm) and 300 ppm.
- (2) The MSA unit does not have the required visual and audible alarms and does not provide remote alarm indication or remain in an indicating mode until reset.
- (3) The MSA unit does not have the required power "on-off" key lock.
- (4) The MSA proposed battery back-up system does not indicate that it has the capability for continuous charge during standard operation as required.

MSA received the September 16 letter on September 20 and protested to this Office on October 4.

2/ The Navy explains that, due to ship availability and funding constraints, the number of units awarded was reduced from the 341 originally solicited.

After the protest was filed, the Navy explained to this Office that the statement in the justification that the Navy had tested monitors manufactured by Foxboro and two other firms was mistaken. Only one monitor, which was manufactured by CEA Instruments, was tested by the Naval Research Laboratory. Nonetheless, the Navy maintains that Foxboro is the only source that can meet the agency's needs. The Navy submitted a statement from an engineer at the Navy technical activity which explains in detail the circumstances which led to the determination that only Foxboro could meet the agency's needs.

According to the engineer's statement, after three Navy personnel died on board the cruiser U.S.S. Bainbridge in 1982 due to a halocarbon leak, the Navy began to seek protection from such leaks. After the agency's initial efforts, using oxygen deficiency monitors, proved unsuccessful, the Navy decided in 1986 that there was a need for separate halocarbon monitoring equipment. At that time, according to the Navy, it initiated a research and development (R&D) acquisition for halocarbon monitors. Although proposals were submitted and evaluated, according to the Navy, no contract was awarded due to a lack of funding and since no new technology was proposed.

After the R&D acquisition was canceled in October 1987, the Navy says that it began to prepare a technical data package for a full and open competitive acquisition of halocarbon detection equipment. Also, the Navy says that at the same time, due to the risks to Navy personnel on certain ships, the agency decided to obtain halocarbon monitors for those ships before the competitive procurement could be instituted. The Navy engineer's statement explains that, with assistance from the Naval Research Laboratory, the agency determined the specifications required for the interim monitors including the accuracy level and certain features to facilitate proper shipboard operation.

The Navy engineer's statement also details a survey of the Kennedy Space Center and the Portsmouth Naval Shipyard, which both used the Foxboro Miran 101, the Mare Island Naval Shipyard, which used the Foxboro Miran 101 and a monitor made by Gas Tech, the Long Beach Naval Shipyard, which also used the Gas Tech monitor, and the aircraft carrier U.S.S. Saratoga which used a monitor made by Multi Ram. Further, the engineer explains that, in the third quarter of fiscal year 1987, a monitor manufactured by CEA Instruments was tested as part of a separate agency effort to evaluate halocarbon monitors for use in shipyards on submarines during overhauls. According to the engineer, based on that test, the CEA monitor was judged unacceptable for shipboard

use and no other manufacturer requested that its monitor be tested. The engineer says that, based on the survey described above, the unsuccessful testing of CEA's monitor, a review of literature on the Foxboro Miran 984/101 and based on the fact that none of the offerors on the 1986 R&D acquisition submitted technical information that demonstrated that they could meet the specifications for this acquisition, the agency concluded that only the Foxboro 984/101 monitor meets the needs of the Navy.

MSA challenges the Navy's evaluation of its proposal and the agency's determination that only Foxboro can supply halocarbon monitors that meet the agency's needs. First, MSA argues that it offered monitors that fully comply with the specifications in the CBD notice and the RFP. MSA says that its offer was not limited to the base Lira 3200 model; rather, it offered monitors specially modified to meet the agency's specifications. To demonstrate that its proposal met the requirements related to detection level, visible and audible alarms, on-off key lock switch and battery back-up, MSA cites the copy of the RFP specifications included in its proposal. MSA says that it routinely uses one of its three base model monitors which it customizes to meet a user's needs by adding standard off-the-shelf MSA components and readily available commercial components. MSA also says that it typically can accomplish these modifications in 60 days. Thus, MSA argues that its monitors are commercially available, off-the-shelf and require no developmental effort.

MSA also argues that Foxboro's Miran 984/101 monitor is sold on the same terms as MSA's monitors. In this respect, MSA notes that Foxboro's proposal merely offered a "Halocarbon/Gas Alarm Monitor Foxboro Co. P/N Miran 984/101 in accordance with specifications contained in Section C," which referred to the same RFP specifications which MSA included in its own offer. Further, MSA notes that Foxboro's literature indicates that the Miran 984/101 typically is modified to meet a user's requirements and, contrary to the RFP specifications, typically detects only one gas.

MSA also argues that it is qualified to supply the monitors since it was previously approved by the Navy for gas analysis on board the Navy's LHD series of combatant vessels and states that the Navy technical activity was aware of MSA's capabilities since the firm submitted a proposal to that activity in response to the 1986 R&D solicitation. Further, MSA says that, in early 1988, it sought to demonstrate its halocarbon monitors for the technical activity but it was told that the agency had

developed specifications and a solicitation would be issued in June 1988.

As a preliminary matter, the Navy argues that the protest is untimely and should not be considered. According to the Navy, MSA's protest challenges the sole-source nature of the procurement. The Navy argues that the June 8 CBD notice gave MSA constructive notice of the terms of the solicitation, including the sole-source nature of the acquisition, and therefore the protest was required to be filed within 10 working days of the CBD notice or within the 45-day period provided by the CBD notice for alternative sources to respond.

The Navy also argues that MSA's protest of the written justification for the use of other than full and open competition is untimely. According to the Navy, MSA did not challenge the justification until the November 18 conference on the protest although that document was available to MSA immediately after the September 16 award. MSA received a copy of the justification with the agency's report on the protest on November 14; the Navy argues that MSA could have but did not request that document immediately after award or with its protest pursuant to our Bid Protest Regulations which allow protesters to request documents relevant to the protest. 4 C.F.R. § 21.3(c) (1988). Accordingly, the Navy argues that MSA failed to diligently pursue the justification document and its protest based on the terms of the justification is untimely.

In our view, the protest was timely filed. The protest is not against the solicitation or the written justification per se, but against the Navy's determination that Foxboro is the only responsible source capable of meeting the agency's needs. Although MSA did not agree with the Navy's determination to that effect which was spelled out in the June 8 CBD notice, the firm was not required to protest at that time. Rather, MSA could reasonably chose at that point to respond to the CBD notice and the solicitation as an alternative source within 45 days as the notice required. In this respect, we do not require prospective protesters to file "defensive" protests before actual knowledge that a basis of protest exists or in anticipation of improper actions by the contracting agency. Custom Training Aids, Inc., B-224868, Feb. 6, 1987, 87-1 CPD ¶ 131. Here, although the CBD notice indicated that a sole-source award was contemplated, it also encouraged alternative sources to submit information or proposals identifying their interest and capability to respond to the requirement. MSA responded within the time required.

On September 20, MSA received the contracting officer's September 16 letter which informed the firm that MSA's proposed monitor did not meet the agency's requirements. MSA timely protested to this Office on October 4, within 10 working days of its receipt of notice of the award and the rejection of its proposal. 4 C.F.R. § 21.2(a)(2). In this regard, we think that MSA's initial protest allegations were sufficiently broad to encompass the written justification which serves as the rationale for the agency's sole-source award. We do not think that the protester was obligated to request a copy of the agency's written justification prior to its receipt of the agency report. It had every reason to expect that it would be provided as a part of the contracting agency's obligation to submit a complete documented report in response to the protest. 4 C.F.R. § 21.3(i).

Because the overriding mandate of CICA is for "full and open competition" in government procurements obtained through the use of competitive procedures, 10 U.S.C. § 2304(a)(1)(A), this Office will closely scrutinize sole-source procurements under the exception to that mandate provided by 10 U.S.C. § 2304(c)(1). WSI Corp., B-220025, Dec. 4, 1985, 85-2 CPD ¶ 626. Where, however, the agency has substantially complied with the procedural requirements of CICA, 10 U.S.C. § 2304(f), calling for written justification for and higher-level approval of the contemplated sole-source action and publication of the required CBD notice, we will not object to the sole-source award unless it can be shown that there is not a reasonable basis for it. Id. In sum, excepting those noncompetitive situations which arise from a lack of advance planning, a sole-source award is justified where the agency reasonably concludes that only one known source can meet the government's needs within the required time. Data Transformation Corp., B-220581, Jan. 16, 1986, 86-1 CPD ¶ 55.

The Navy now concedes that the written justification incorrectly stated that monitors produced by Foxboro and two other firms were tested by the Naval Research Laboratory. Nonetheless, that error does not undermine the agency's determination that Foxboro is the only company that manufactures an off-the-shelf halocarbon monitor that meets the listed capabilities. The written justification merely explained that the testing was one reason why a market survey was not conducted. In fact, as the Navy engineer's statement explains, the agency's technical activity did survey at least four Navy activities and the Kennedy Space Center with regard to halocarbon monitors. While it would have been better if MSA's monitors had been tested or included in the earlier survey, since MSA responded to the

CBD notice and the RFP, the firm was given an opportunity to show that it could meet the agency's requirements.

Since the Navy substantially complied with the requirements for a written justification and publication in the CBD, the propriety of the agency's decision to procure the monitors on a sole-source basis rests on whether or not it was reasonable to conclude that only one source was available. Turbo Mechanical, Inc., B-231807, Sept. 29, 1988, 88-2 CPD ¶ 299. The Navy's determination to that effect was based on its one test, the earlier survey and the fact that none of the proposals submitted in response to the RFP, including that of MSA, met the agency's requirements.

In its proposal and its August 3 letter, MSA offered a Lira 3200 monitor in a Nema 4X enclosure with a battery back-up and included a copy of the RFP specifications and literature on the Lira 3200, which included some terms different from the RFP specifications. While admitting that its standard Lira 3200 does not, as the agency points out, meet all of the solicitation requirements, MSA argues that because its proposal included a copy of the specifications and stated that it routinely modifies its monitors to meet a user's needs, the Navy should have concluded that the firm could supply a compliant unit.

We do not agree. In the circumstances of this case, where the CBD notice and the RFP included very detailed statements of the agency's requirements, we think that it was incumbent upon MSA to provide technical data showing how it would meet those requirements. Moreover, the record indicates that the Navy gave MSA the opportunity to elaborate on its proposal but the firm did not provide the required information. In this respect, after MSA's initial submission, the Navy's contract negotiator asked the firm to provide technical data on the monitor which the firm offered and to specify where in the data each of the RFP requirements was met. In its August 3 submission, however, MSA still did not submit information showing how it would meet each of the requirements. Further, although in its protest submissions MSA continues to argue that it routinely modifies its basic monitors to meet a user's requirements, MSA still has not submitted technical data or even a list of the commercially available parts which it would use to modify its basic Lira 3200 to meet the Navy's listed requirements.

In Audio Intelligence Devices, 66 Comp. Gen. 145 (1986), 86-2 CPD ¶ 670, which was cited by MSA, we concluded that the Customs Service failed to show a reasonable basis for its conclusion that only one source could provide the required transmitter/receiver systems, since the agency did

not take into account the protester's offer to modify its standard products to meet the agency's needs. While in that case, the protester responded to a CBD announcement, here, in contrast, MSA requested and responded to a solicitation which included a very detailed statement of the agency's needs. Moreover, as the Navy explains, and the protester does not dispute, MSA was specifically asked for the necessary technical information showing how the firm would meet the requirements, but did not provide it. Given these facts, we think that the decision in Audio Intelligence Devices, 66 Comp. Gen., supra, is inapplicable here. Further, on the record before us, we cannot conclude that the Navy unreasonably determined that MSA was not an available source to provide the monitors. See A/E Group, Inc., B-227886.2, Nov. 5, 1987, 87-2 CPD ¶ 447.

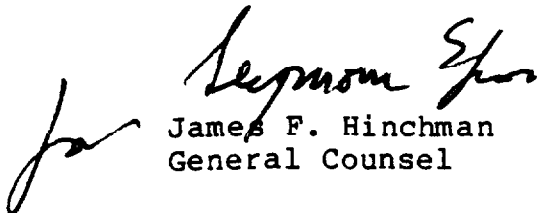
To the extent that MSA is protesting that Foxboro's submission in response to the solicitation was unacceptable, we find the argument to be without merit. The solicitation called for Foxboro monitors, part number 984/101, which is what Foxboro proposed. Since Foxboro's offer was based on the brand name item specified in the solicitation, any additional descriptive material was unnecessary. See Memorex Corp., B-230111, Feb. 19, 1988, 88-1 CPD ¶ 172.3/

MSA also protests that the Navy's written justification does not include "a determination that the anticipated cost will be fair and reasonable," as required by 10 U.S.C. § 2304(f)(3)(C). The justification stated that this determination would be made at the time of award. We agree that the determination should have been included in the justification. In fact, we are not sure why the determination could not have been made at the time the justification was written since the monitor was an off-the-shelf item.

3/ If MSA is arguing that Foxboro's 984/101 does not meet the specifications listed in the solicitation, this issue is untimely. Protests of alleged improprieties which are apparent prior to the closing date for receipt of proposals must be protested prior to the closing date. 4 C.F.R. § 21.2(a)(1). The solicitation called for Foxboro 984/101 monitors and included detailed specifications. If MSA considered those specifications to be inconsistent with the listed Foxboro monitor, it was required to protest prior to the closing date for receipt of proposals.

Nevertheless, we do not think this omission had any impact on the rejection of MSA's proposal. Consequently, it resulted in no prejudice to the protester.

The protest is denied.

James F. Hinchman
General Counsel